



## Final Regulation Agency Background Document

<b>Agency name</b>	Board of Nursing, Department of Health Professions
<b>Virginia Administrative Code (VAC) citation</b>	18VAC90-25-10 et seq.
<b>Regulation title</b>	Regulations Governing the Certification of Nurse Aides
<b>Action title</b>	Funding shortfall for CNA program
<b>Document preparation date</b>	September 21, 2005

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

The Board is proposing an increase in the biennial renewal fee for certified nurse aides from \$45 to \$50.

### Statement of final agency action

*Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.*

On September 20, 2005, the Board of Nursing adopted a final amendment for regulation 18VAC90-25-10 et seq. to increase the biennial renewal fee for certified nurse aides.

### Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly*

chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

---

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400 (5) provides the Board with a duty to levy and collect fees and (6) provides the authority to promulgate regulations to administer the regulatory system:

***§ 54.1-2400 -General powers and duties of health regulatory boards***

*The general powers and duties of health regulatory boards shall be:*

*5. To levy and collect fees for application processing, examination, registration, certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.*

*6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ [54.1-100](#) et seq.) and Chapter 25 (§ [54.1-2500](#) et seq.) of this title.*

The federal mandate for a nurse aide registry is found in the Omnibus Budget Reconciliation Act of 1987 (OBRA '87), which set out certain requirements for long term care that must be met in order to receive Medicare and Medicaid funding. States are directed to establish a Nurse Aide Registry, set minimal standards for nurse aide education and competency testing for certification, and keep permanent records of findings of abuse, neglect and misappropriation of resident property. The federal legislation also prohibits a state from charging any fee to place a nurse aide on the registry. In 1989, the General Assembly directed the Board of Nursing to implement OBRA requirements (see Article 4 of Chapter 30 of Title 54.1).

## Purpose

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.*

---

One of the tenets of public safety is the societal interest in assuring that vulnerable persons are safe. Vulnerability is the hallmark of persons in long-term nursing and assisted living facilities and those in need of daily care in the home. They are the most vulnerable of patients. Yet, it is these persons who are every day left in the care and supervision of the lowest paid and least trained health care providers – nurse aides. Actions taken to discipline nurse aides are analogous to the prosecution of criminals who abuse, assault, or rob citizens. Therefore, it is in the public's interest to ensure that sufficient funding is available to protect the chronically feeble and infirm through the investigation and adjudication of certified nurse aides.

The Board of Nursing has struggled with funding for the nurse aide programs for a number of years. While the disciplinary caseload has continued to grow, funding provided from the Department of Medical Assistance Services (DMAS) through Medicaid for the Certified Nurse Aide (CNA) program has been reduced over the past few years. Beginning in FY'05, if no action is taken, it is projected that the program would incur a deficit of approximately \$400,000. By FY 2009-10 the effect of the reduction in Medicaid funding and inaction by the Board would be a cumulative shortfall in the Nurse Aide budget of approximately \$3 million.

As a special fund agency, the Board of Nursing is mandated to levy fees sufficient to cover all expenses for the administration and operation of the board and the Department of Health Professions. Therefore, action must be taken to address the current and projected shortfall in the Nurse Aide budget.

### Substance

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.*

The Board is proposing an increase in the biennial renewal fee for certified nurse aides from \$45 to \$50.

### Issues

*Please identify the issues associated with the proposed regulatory action, including:*

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
  - 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
  - 3) other pertinent matters of interest to the regulated community, government officials, and the public.*
- If there are no disadvantages to the public or the Commonwealth, please indicate.*

1) The primary advantage to the public of implementing the amended provisions is the availability of sufficient funding to continue the investigation and adjudication of disciplinary cases involving abuse, neglect or misappropriation of property by certified nurse aides. Without funding for the nurse aide program, complaints may not be fully investigated and disciplinary actions taken against nurse aides who may prey on elderly or disabled persons. At the same time, the very modest increase in the biennial renewal fee should not decrease the number of persons who are willing to seek certification or who are working in long term care. There are no disadvantages to the public.

2) The primary advantage to the agency is an increase in revenue to apply toward the deficit in funding for the nurse aide program. There are no disadvantages, since the combination of nursing and nurse aide budgets can be accomplished while continuing to identify separate revenue and expenditure streams.

3) There is no other pertinent matter of interest related to this action.

### Changes made since the proposed stage

*Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.*

There were no changes made to the proposed regulation since its publication.

### Public comment

*Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.*

A proposed amendment to regulations establishing a \$5 increase in the biennial renewal fees for certified nurse aides was published in the Virginia Register of Regulations on May 30, 2005. Public comment was requested for a 60-day period ending July 29, 2005.

A summary of the comments received in writing or electronically is as follows:

Two instructors in nurse aide programs requested that a fee increase not be adopted because the pay for CNA's is so low they have a hard time making ends meet now.

A certified nurse aide asked that the Board reconsider an increase because CNA's are underpaid already.

A public hearing held before the Board on July 19, 2005, at which there was no comment.

*Response: The Board appreciates the comments on proposed regulations and acknowledges that certified nurse aides are overworked and underpaid for the important work they perform. Since health regulatory boards do not receive any general fund (tax) dollars and must be self-supporting, the Board must adopt fees sufficient to generate revenue to meet expenses. The Nurse Aide Registry has been a separate cost center within the Board of Nursing and has operated with a deficit for a number of years. In order to generate sufficient income to cover expenditures relating to the regulation and discipline of nurse aides, the Board would need to double the renewal fee for nurse aides to \$90. To avoid making that choice, the Board voted to merge the budgets of Nursing and Nurse Aides, so that some of the fees paid by nurses can help support the Nurse Aide Program. That has enabled the Board to adopt a very modest increase of \$5 every two years which the Board believes is a reasonable amount.*

### All changes made in this regulatory action

*Please detail all changes that are being proposed and the consequences of the proposed changes.*

*Detail new provisions and/or all changes to existing sections.*

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
80	n/a	The required fee for renewal every two years is \$45.	<p>The required fee for renewal every two years would be \$50.</p> <p><i>While the increase in the renewal fee will not begin to address the projected shortfall, it is necessary for nurse aides to partially support the regulatory and disciplinary burden of the board through their fees. An increase of \$2.50 a year for a professional certificate should not present a financial burden to the nurse aides nor deter an individual from entering the profession.</i></p>

**Family impact**

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability.*

There is a potential impact on the institution of the family or on family stability for failure to take regulatory action, which would likely result in a significant reduction in expenditures related to the investigation and adjudication of complaints against nurse aides for abuse, neglect, and misappropriation of property. That would leave the most vulnerable members of families subject to neglect or mistreatment by some persons who should have been removed from the Registry but would be able to continue in practice. On the other hand, the Board realized that any significant increase in fees for certified nurse aides would have a negative effect on their ability to support themselves and their families and could represent a real hardship to persons who are making little more than minimum wage. Therefore, the fee increase is minimal (\$5 per biennium) and should have little or no impact on nurse aides and their families.